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**IN THE
COURT OF APPEALS OF INDIANA**

AAREON NEELY,

Appellant-Defendant,

VS.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 71A03-0609-CR-414

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable Jerome Frese, Judge
71D03-0509-FB-115

February 26, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Judge

Appellant-defendant Aareon Neely appeals his conviction for Aggravated Battery,¹ a class B felony. Specifically, Neely argues that the evidence was insufficient to support his conviction and that his six-year executed sentence violates the Proportionality Clause of the Indiana Constitution. Finding that the State presented sufficient evidence and that Neely waived his constitutional argument on appeal, we affirm the judgment of the trial court.

FACTS

On the evening of August 1, 2005, Christopher Byrd called Tiffany Miller's cell phone while he was working at a Wendy's restaurant in St. Joseph County. Neely answered Miller's phone, and when Byrd asked to speak to Miller, Neely informed him that she was not there and the two ended the conversation. Approximately one minute later, Neely called Byrd and asked who he was. After Neely and Byrd identified themselves and realized that they had attended high school together, Neely instructed Byrd, "Don't call my girl no more." Tr. p. 104. Byrd replied, "Don't tell me who I can and who I can't call[,]" and hung up the phone. Id. Neely and Byrd called each other "a couple more times" and engaged in "trash talk." Id. at 104-05. During their last conversation, Neely informed Byrd that he knew where Byrd worked and that he would see him later.

Approximately one hour later, Neely arrived at the Wendy's restaurant with his brother and three other friends. One of Byrd's coworkers informed him that someone outside wanted to see him. As Byrd approached the dining room door to open it, Neely "rushed" him, knocking Byrd onto the floor of the restaurant. Id. at 107. As Byrd lie on the floor,

¹ Ind. Code § 35-42-2-1.5.

Neely and the other men “kicked and stomped” on him. Id. at 50. Following the beating, the men left Byrd unconscious and lying in a pool of blood. A short time later, the police arrived and Byrd was transferred to Memorial Hospital. The surveillance camera from the restaurant recorded the attack.

Byrd spent three days in the hospital and was treated for a skull fracture, blood loss from his right ear, bruises and cuts, and abrasions to his face. After he was released from the hospital, he had severe headaches and slept for “a great deal of time” for the first week after the release. Id. at 66. As he continued to recover, Byrd suffered from muffled hearing in his right ear and ear drainage that sometimes included blood. On September 19, 2005, Byrd visited the Hearing Clinic in South Bend, and audiometric tests confirmed that he had hearing loss in his right ear. However, Byrd’s hearing returned to normal approximately three months after the attack.

On September 13, 2005, the State charged Neely with class B felony aggravated battery and class C felony battery. A jury trial began on April 3, 2006, and the jury found Neely guilty as charged. The trial court merged the two offenses and entered a conviction for the class B felony aggravated battery. The trial court held a sentencing hearing on May 3, 2006, and sentenced Neely to ten years imprisonment with four years suspended. Neely now appeals.

DISCUSSION AND DECISION

I. Sufficiency

Neely argues that the State did not present sufficient evidence to sustain his conviction for class B felony aggravated battery. Specifically, Neely argues that Byrd's lingering hearing loss did not constitute "protracted loss or impairment of the function of a bodily member or organ" for purposes of the aggravated battery statute.² I.C. § 35-42-2-1.5(2).

The standard of review for sufficiency claims is well settled. In addressing Neely's challenge we neither reweigh the evidence nor reassess the credibility of witnesses. Sanders v. State, 704 N.E.2d 119, 123 (Ind. 1999). Instead, we consider the evidence most favorable to the verdict and draw all reasonable inferences that support the ruling below. Id. We affirm the conviction if there is probative evidence from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. O'Connell v. State, 742 N.E.2d 943, 949 (Ind. 2001). A conviction may be sustained on circumstantial evidence if such evidence supports a reasonable inference of guilt. Maul v. State, 731 N.E.2d 438, 439 (Ind. 2000).

To convict Neely of aggravated battery, the State was required to prove beyond a

² Indiana Code section 35-42-2-1.5 provides:

A person who knowingly or intentionally inflicts injury on a person that creates a substantial risk of death or causes:

- (1) serious permanent disfigurement;
- (2) protracted loss or impairment of the function of a bodily member or organ; or
- (3) the loss of a fetus;

commits aggravated battery, a Class B felony.

reasonable doubt that Neely knowingly or intentionally inflicted injury on Byrd causing Byrd “protracted loss or impairment of the function of a bodily member or organ.” I.C. § 35-42-2-1.5(2). In Neville v. State, we recognized that “there is no statutory definition for the word ‘protracted.’” 802 N.E.2d 516, 518 (Ind. Ct. App. 2004). Consequently, we turned to the rules of statutory interpretation to determine and give effect to the intent of the legislature, and we ultimately held that the plain meaning of “protracted” is “to draw out or lengthen in time; prolong.” Id. Following the same logic, we held in Fleming v. State that the word “impairment” means “[t]he fact or state of being damaged, weakened, or diminished” for purposes of the aggravated battery statute. 833 N.E.2d 84, 89 (Ind. Ct. App. 2005).

Byrd testified at trial that he had never suffered from hearing loss or ear drainage before Neely’s attack. Tr. p. 109. After experiencing muffled hearing and significant ear drainage for six weeks after the attack, Byrd visited an audiologist at the Hearing Clinic in South Bend who determined that Byrd had hearing loss in his right ear, suffered from acute suppurative otitis media, and would need prescription medication to relieve the symptoms. See id. at 66-87. At trial, Jamie Stickley—an audiologist from the Hearing Clinic—analyzed the results of Byrd’s audiogram and concluded that he had been experiencing hearing loss in the “upper frequencies” of his right ear and that even though the other frequencies were unaffected, “there [was] still a conductive component in his ears where he’s not hearing quite as well as what he would typically be expected to.” Id. at 87. Stickely acknowledged that Byrd’s injury was likely caused by trauma to the ear. Id. at 92.

At trial, Byrd also testified about his injury: “After the incident I had muffled hearing.

I had blood still draining out of my ear, blood and some other kind of fluid. . . . And I couldn't really hear that well.” Id. at 109. Even after visiting the audiologist and taking the prescribed medication, Byrd said he still experienced problems “in activities like when I was playing basketball[,] when I start running, my ear would continue to drain and just always had liquid and stuff draining in my ear, and it bec[a]me muffled.” Id. Byrd testified that his hearing returned to normal “two to three months after the incident.” Id.

The gravamen of Neely’s argument is that Byrd’s injuries were not severe enough and did not last long enough to serve as the basis for the aggravated battery conviction. While Neely directs us to numerous cases where this court has upheld aggravated battery convictions based on injuries admittedly more severe than Byrd’s, those cases do not mandate that we reverse Neely’s conviction simply because Byrd’s injuries were less severe. See Seketa v. State, 817 N.E.2d 690 (Ind. Ct. App. 2004) (upholding defendant’s conviction for aggravated battery where defendant shot victim in the stomach with a gun); Wilcher v. State, 771 N.E.2d 113 (Ind. Ct. App. 2002) (upholding defendant’s conviction for aggravated battery where defendant stabbed victim near the heart); Salone v. State, 652 N.E.2d 552 (Ind. Ct. App. 1995) (upholding defendant’s conviction for aggravated battery where burns defendant inflicted on victim’s hands rendered the hands unusable for fourteen to sixteen weeks). Instead, we will uphold Neely’s conviction if we conclude that the jury could have reasonably inferred, based upon the evidence presented at trial, that the injuries Neely inflicted on Byrd caused Byrd protracted loss or impairment of the function of a bodily member or organ.

Based upon the testimony of Byrd and the audiologist,³ we conclude that Neely's sufficiency challenge fails because the evidence established that, as a direct result of the injuries Neely inflicted on Byrd, Byrd suffered significant hearing loss that impacted his life for two to three months after the attack. The injury was for a prolonged period of time, required treatment, and his hearing was diminished for the months following the attack. In light of our previous definitions of the terms, it was reasonable for the jury to conclude that Byrd's hearing loss was a "protracted loss" or "impairment" for purposes of the aggravated battery statute. Fleming, 833 N.E.2d at 89; Neville, 802 N.E.2d at 518. Therefore, Neely's sufficiency challenge fails.

II. Proportionality of Sentence

Neely argues that the sentencing statute for aggravated battery violates the Proportionality Clause of the Indiana Constitution.⁴ Specifically, Neely argues that the elements of both a class C felony battery conviction and a class B felony aggravated battery conviction "mirror each other" and can be proven by "the same evidence." Appellant's Br. p. 18. Neely argues, therefore, that the six to twenty-year sentence range authorized by Indiana Code section 35-50-2-5 for an aggravated battery conviction is unconstitutional in light of the two to eight-year sentence range authorized by Indiana Code section 35-50-2-6 for a class C felony battery conviction.

³ By holding that the State presented sufficient evidence in part because an audiologist testified at trial, we are not suggesting that an expert is required to testify in every aggravated battery case. See Fleming, 833 N.E.2d at 88-89 (holding that expert testimony is not required to satisfy the "protracted loss or impairment of the function of a bodily member or organ" element of the aggravated battery statute).

Neely acknowledges that he did not challenge the constitutionality of the aggravated battery sentencing statute at the trial court level. Appellant's Br. p. 16. Generally, a challenge to the constitutionality of a criminal statute must be raised by a motion to dismiss prior to trial, and the failure to do so waives the issue on appeal. Ind. Code § 35-34-1-4(b); I.C. § 35-34-1-6(a)(3); Smith v. State, 727 N.E.2d 763, 766 (Ind. Ct. App. 2000). Here, Neely failed to file a motion to dismiss and did not object to the constitutionality of the statute at trial. Therefore, he has waived this argument on appeal. Adams v. State, 804 N.E.2d 1169, 1172 (Ind. Ct. App. 2004).

The judgment of the trial court is affirmed.

DARDEN, J., and ROBB, J., concur.

⁴ Article 1 Section 16 of the Indiana Constitution provides, in part, that “[a]ll penalties shall be proportioned to the nature of the offense.”